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No. 95-226

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ROBERT A. HAVERSAT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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13 pp

TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		ii
I.	THE PETITION RAISES THE SAME ISSUES AS KOON AND POWELL V. UNITED STATES	1
II.	THE CIRCUITS ARE DIVIDED AS TO THE STANDARD FOR GRANTING A DEPARTURE	3
III.	THE CIRCUITS DISAGREE AS TO THE STANDARD FOR DEPARTING BASED ON GOOD CHARACTER	7
IV.	THE CIRCUITS DISAGREE AS TO WHETHER ASSISTING THE COURTS IS A DEPARTURE BASIS	8
CONCLUSION		10

TABLE OF AUTHORITIES

Cases	Page(s)
Koon v. United States, 116 S. Ct. 39 (Sept. 27, 1995)	1, 2, 3, 7
Powell v. United States, 116 S. Ct. 39 (Sept. 27, 1995) (No. 94-8842)	1, 2, 3, 7
United States v. Broderson, -- F.3d -, 1995 U.S. App. LEXIS 27742 (2d Cir. Sept. 29, 1995)	1
United States v. Big Crow, 898 F.2d 1326 (8th Cir. 1990)	8
United States v. DeMasi, 40 F.3d 1306 (1st Cir. 1994), cert. denied, 115 S. Ct. 947 (1995)	4, 5
United States v. DeMonte, 1992 U.S. App. LEXIS 11392 (6th Cir. May 12, 1992); 25 F.3d 343 (6th Cir. 1994)	10
United States v. Garcia, 926 F.2d 125 (2d Cir. 1991)	10
United States v. Rivera, 994 F.2d 942 (1st Cir. 1993)	1, 2, 3, 5
Williams v. United States, 503 U.S. 193 (1992)	2

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Robert A. Haversat respectfully files this reply brief in support of his petition for a writ of certiorari to review the decisions of the United States Court of Appeals for the Eighth Circuit. The petition should be granted to resolve conflicts in the circuits as to the standard for granting a downward departure under Federal Sentencing Guideline §5K2.0, which is an important federal question.

I.

THE PETITION RAISES THE SAME ISSUES AS KOON AND POWELL V. UNITED STATES

The Government reads the petition narrowly in order to make the argument that it does not raise the same issues as Koon v. United States, 116 S. Ct. 39 (Sept. 27, 1995) (No. 94-1664), or Powell v. United States, 116 S. Ct. 39 (Sept. 27, 1995) (No. 94-8842), in which this Court has granted certiorari. Koon and Powell raise the issue of whether a departure based on a factor neither forbidden nor discouraged by the guidelines is reviewed de novo or else under the standard set forth in United States v. Rivera, 994 F.2d 942 (1st Cir. 1993).[1] (Gov't Br. at 11).[2]

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[1] Recently, the Second Circuit adopted the standard set forth in Rivera. United States v. Broderson, -- F.3d --, 1995 U.S. App. LEXIS 27742 (2d Cir. Sept. 29, 1995).

[2] "Gov't Br." refers to the Brief for the United States in Opposition to the Petition for a Writ of Certiorari. "Pet." refers to Mr. Haversat's Petition for a Writ of Certiorari.

The petition in this case cited Rivera, which set forth a three-part standard for reviewing a downward departure under §5K2.0. (Pet. 9-10). In Rivera, then Chief Judge Breyer of the First Circuit explained that the guidelines include (1) factors that are encouraged as grounds for departure, such as diminished capacity, (2) factors that are discouraged as grounds for departure, such as age, education, and employment record, which are not "ordinarily relevant" in determining departures, and (3) factors that are forbidden as grounds for departure, such as race, sex and national origin. Rivera, 994 F.2d at 948. In addition, the district court may be asked to depart on the basis of a factor that is not encouraged, discouraged or forbidden. Id. at 949.

The petitions in Koon and Powell and the petition in this case all concern the appropriate standard for reviewing a downward departure under §5K2.0. (Pet. 1). The only distinction is that Koon and Powell concern factors neither expressly prohibited nor discouraged as grounds for departure, and this case concerns factors discouraged as grounds for departure. That is a distinction without a difference. The petitions in Koon and Powell and in this case all argue that the court of appeals should defer to certain findings of the district court at sentencing. In fact, the petition in this case argues that the court of appeals' decision is "inconsistent with the court of appeals' traditional deference to a district court's exercise of its sentencing discretion." (Pet. 16) (quoting Williams v. United States, 503 U.S. 193 (1992)). Moreover, the petition concludes: "This Court should provide guidance to the courts of appeals and the district courts as to the appropriate standard to be applied under the downward departure provision of the Federal Sentencing Guidelines." (Pet. 22).

Should this Court adopt Rivera as the standard for reviewing downward departures, then the judgment in this

case would ultimately be reversed. Under Rivera, the court of appeals must accord deference and "respect to sentencing court determinations of whether (and the extent to which) given circumstances make a case 'unusual' or 'not ordinary.'" Rivera, 994 F.2d at 952. The reason is that the district court has a "unique vantage point," a "special competence," and a "better 'feel' for the unique circumstances of the particular case before it," having seen far more guidelines cases than the appellate courts have seen. Id. at 951. The court of appeals in this case afforded no deference or respect to the findings of the district court that petitioner's extraordinary community service and assistance to the judiciary merited downward departure. Instead, contrary to Rivera, the court of appeals stated: "[A]s a question of law, we determine 'whether the circumstances the district court relied on for departure are sufficiently unusual in kind or degree to warrant departure.'" (Pet. A5).

Accordingly, while this petition warrants certiorari on its own merits, it also raises issues encompassed by Koon and Powell and should therefore be held pending a decision in those cases.

II.

THE CIRCUITS ARE DIVIDED AS TO THE STANDARD FOR GRANTING A DEPARTURE

The petition for a writ of certiorari should be granted to resolve a conflict in the circuits as to the appropriate test for determining whether a downward departure is permissible under §5K2.0 of the Sentencing Guidelines. (Pet. 5-14). Section 5K2.0 authorizes a departure based on a factor of a kind or to a degree not considered by the guidelines. The First Circuit has held that, in deciding

whether a factor is present to an unusual degree, the district court should compare all cases involving that factor, regardless of the offense of conviction, and the Ninth Circuit has suggested its agreement with this approach. (Pet. 8-11). However, the Eighth Circuit in this case, joining three other circuits, held that the district court should compare only cases involving the same offense. (Pet. 7 & 11-14). In particular, the Eighth Circuit reversed a downward departure based on petitioner's community activities,[3] on the grounds that those activities, while "considerable" and "laudable," did not make him an "atypical defendant in antitrust price-fixing cases." (Pet. A11) (emphasis in original).[4]

The Eighth Circuit's decision is in direct conflict with the First Circuit's decision in United States v. DeMasi, 40 F.3d 1306, 1323-24 (1st Cir. 1994), cert. denied, 115 S. Ct. 947 (1995), which acknowledged this case as contrary authority. Id. at 1324. In DeMasi, the district court granted a departure to a bank robber on the grounds that his community service was atypical for a bank robber. The First Circuit reversed, holding that the district court should not have restricted its comparison to bank robbery cases, but

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[3] Petitioner submitted an affidavit and supporting letters establishing that, for twenty years, he has devoted an average of nine working weeks per year to community projects. (C.A. App. (No. 93-2091) at 119-135).

[4] Even if the Eighth Circuit's standard is correct, it should have permitted the district court to compare petitioner to other antitrust offenders on remand, rather than usurping the district court's role and conducting the comparison itself.

instead should have compared the defendant to all other defendants with past records of community service.[5]

The Government's effort to reconcile this case with DeMasi is unconvincing. Specifically, the Government argues that the guidelines for antitrust offenses take into consideration that antitrust offenders have performed community service, but the guidelines for bank robbery do not assume that most bank robbers have performed community service. (Gov't Br. at 5-6). That argument is both nonsensical and unworkable. Community service is not an element of the guidelines for antitrust offenses or any other offense. Indeed, the antitrust guidelines make no mention of community service in the base offense guideline, specific offense characteristics, or official commentary. Nor is it the proper role of the court of appeals to find that antitrust offenders commonly perform community service or otherwise have extraordinarily good character.

It is apparent that the Government has confused offense characteristics with offender characteristics.[6] The

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[5] The Government argues that petitioner did not show that he was outside the "heartland" of antitrust cases under §2R1.1. (Gov't Br. at 5). That argument misses the mark. The point is that petitioner was outside the heartland of §5H1.11, which provides that community service is "not ordinarily relevant" in determining a departure.

[6] For example, in Rivera, 994 F.2d at 956, the court held that the embezzlement guidelines encompass ordinary restitution needs, and therefore a departure may not be granted to permit the defendant to work and make restitution rather than serving a prison term. Rivera is the classic case of an offense characteristic.

antitrust guideline, §2R1.1, does not purport to define offender characteristics. However, Part H does set forth certain offender characteristics, including "military, civic, charitable or public service; employment-related contributions; record of prior good works," in §5H1.11, which are ordinarily not relevant in determining a departure. Because the district court found that petitioner's prior good works were extraordinary, the departure was appropriate.

If adopted, the Government's analysis would permit the courts of appeals to speculate about the kinds of traits that particular kinds of offenders are likely to have, even though the guidelines for the offense in question contain no indication that a particular trait was considered by the Commission in formulating that guideline. For example, the courts would doubtless be called upon to determine whether drug offenders are more likely to be violent, and if so, whether the guidelines for drug offenses assume that the defendant has a propensity for violence, so that an upward departure based on violent acts is not warranted. This quasi-sociological exercise, riddled as it is with stereotypes and assumptions, is not an appropriate or principled basis for sentencing, especially at the level of the court of appeals.[7]

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[7] There are cases in which a factor is included as a specific offense characteristic attached to the offense guideline, and therefore a departure based on that factor would ordinarily be inappropriate. For example, the robbery guideline, U.S.S.G. §2B3.1(b)(2) includes a specific offense characteristic for the use of a weapon, and therefore an upward departure based on the use of a weapon would usually be unwarranted. Policy Statement §5K2.0 makes specific reference to this kind of double-counting, and the cases cited by the Government are consistent with this

The Government claims that the question of whether a defendant should be compared to persons who have committed the same offense or to all other defendants is merely a question of guidelines interpretation which should be left to the Sentencing Commission. (Gov't Br. at 7). But this case does not involve a question of guidelines interpretation; it concerns the proper application of §5K2.0 and the standard of review for downward departures. Moreover, conflicts in the courts of appeals are to be resolved by the Supreme Court, and not the Sentencing Commission, especially on a question as important as the proper application of the downward departure provision, §5K2.0. This Court recognized this basic principle by granting certiorari in Koon v. United States, 116 S. Ct. 39 (Sept. 27, 1995) (No. 94-1664), and Powell v. United States, 116 S. Ct. 39 (Sept. 27, 1995) (No. 94-8842). Indeed, under the Government's view, this Court could ever review guidelines cases, on the theory that those issues should be resolved by the Sentencing Commission.

III.

THE CIRCUITS DISAGREE AS TO THE STANDARD FOR DEPARTING BASED ON GOOD CHARACTER

The petition should be granted to resolve the conflict in the circuits as to the standard for granting a departure based on the defendant's extraordinarily good character. (Pet. 14-16). Only the Eighth Circuit requires the defendant to show that he struggled in a difficult environment or otherwise overcame some significant hardship. (Id. 14-15).

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analysis. (Gov't Br. at 7).

The Government erroneously argues that the Eighth Circuit did not impose that requirement on petitioner. (Gov't Br. at 8). In fact, the Eighth Circuit held that a downward departure was not authorized under its prior decision in United States v. Big Crow, 898 F.2d 1326, 1330-32 (8th Cir. 1990), which affirmed a departure based on the defendant's "excellent employment history, solid community ties, and consistent efforts to lead a decent life in a difficult environment" on a reservation. The Eighth Circuit held that Big Crow did not apply for the following reason: "We did not authorize a general 'good character' departure in Big Crow. We simply found that the fact that Big Crow had consistently made efforts to overcome the extreme hardship of life on the reservation supported a departure." (Pet. A9-10). Under this interpretation, the Eighth Circuit concluded: "Given the fact that Haversat and the district court failed to point to any evidence in the record to show how Haversat 'struggled in a difficult environment' or otherwise overcame some significant hardship, the district court's downward departure was not authorized under Big Crow." (Pet. A10).

IV.

THE CIRCUITS DISAGREE AS TO WHETHER ASSISTING THE COURTS IS A DEPARTURE BASIS

The petition should be granted because the circuits are divided as to whether a departure under §5K2.0 may be based on the defendant's assistance to the courts. Here, petitioner entered an early plea of nolo contendere and facilitated the settlement of numerous, complex, related civil antitrust suits. (Def. C.A. App., No. 94-3719, at 37-40).

The Government's response to this argument is wide of the mark. The point is not that a guilty plea is an element

under the acceptance of responsibility guideline, §3E1.1, or that a defendant's assistance to the prosecution is a ground for downward departure under §5K1.1 upon a motion by the government. Rather, the issue is whether §5K2.0 permits a downward departure based on a defendant's extraordinary assistance to the judiciary, by entering an early nolo plea and causing numerous civil suits to be settled, thereby saving years of judicial resources. (Pet. 18).[8] Because neither the acceptance of responsibility guideline, §3E1.1, nor the assistance to the prosecution guideline, §5K1.1, adequately address the basis for the departure in this case, the Eighth Circuit's reversal of the downward departure was in error.

But in any event, the question at this stage of the proceedings is not whether the Eighth Circuit's decision was correct, but whether that decision conflicts with cases in other circuits. The indisputable answer is that a conflict in the circuits exists. (Pet. 18-22). The Government's effort to distinguish the decisions of other circuits based on the facts of those particular cases does not address the issue of whether a conflict exists. Regardless of the details of those

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[8] The Government incorrectly states that petitioner helped settle a single antitrust suit. (Gov't Br. at 9). In addition, in its statement of the case, the Government erroneously states that, as a condition of accepting the defendants' pleas of nolo contendere, the district court "insisted that McKinney and other co-conspirators settle related civil suits that were pending against them." (Gov't Br. at 3). In fact, at resentencing, the district court acknowledged that petitioner and his co-defendants had voluntarily initiated the settlement process, which was "well underway" before the defendants requested permission to enter nolo pleas. (Def. C.A. App., No. 94-3719, at 82).

other cases, the fact remains that the Eighth Circuit held in this case that, as a matter of law, assistance to the courts is not grounds for departure, stating: "We have never authorized a downward departure on the basis of a defendant's assistance to the courts." (Pet. A7). That holding is in direct conflict with the decisions of the Second and Sixth Circuits in United States v. Garcia, 926 F.2d 125, 127-28 (2d Cir. 1991); United States v. DeMonte, 1992 U.S. App. LEXIS 11392 (6th Cir. May 12, 1992) and 25 F.3d 343 (6th Cir. 1994), both of which held that assistance to the courts is a legal basis for departure. (Pet. 20-22).

CONCLUSION

For the reasons stated in the petition and this reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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